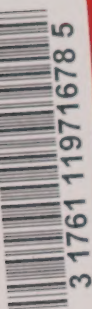


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A Submission to the Subcommittee
on the Revision of Copyright

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A Submission to the
SUBCOMMITTEE ON THE REVISION OF COPYRIGHT
House of Commons

March 4, 1985

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**A Submission to the
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Introduction

In this submission, a broad economic approach is taken to copyright reform. No attempt is made to relate proposals and suggestions to specific sections of the existing Act. Rather, an attempt is made to relate copyright reform to broader economic issues, including the emergence of a post-modern, post-industrial economy. It is suggested that such a perspective is required if effective reform is to be achieved. Opinions expressed are those of the author and do not necessarily reflect the policies or opinions of the Canada Council.

The Challenge of the Emerging Post-Modern Economy

In Second World or Marxist economies, the National Accounts record only the activities of primary and secondary industries, i.e., farming, fishing, forestry, mining and manufacturing. Unlike First World, or market economies, Marxist countries do not report activities of tertiary industries, e.g., services such as banking and finance (Hillman-Chartrand, 1979).

Increasingly, however, both First and Second World nations are paying increasing attention, through special legislation as well as fiscal and tax policies, to a quaternary sector of the economy responsible for production of abstract goods and services. Quaternary goods and services include scientific and technical inventiveness, excellence in the arts, quality of life, community development, national unity, natural rights of the environment and other abstract, but highly valued, aspects of contemporary life.

While quaternary commodities are highly valued by society they cannot be marketed in the conventional way. Most private goods and services are characterized by exclusion, e.g., if I own an automobile then I can exclude others by keeping it under lock and key. However, there is no physical way of excluding others from using one's ideas, words or images. Rather, they must be transformed through law before "value-in-exchange" can be created, and "free-riders" excluded (Garnham, 1977). In modern society, creative effort is transformed, and to a

greater or lesser degree, protected from piracy through intellectual property legislation. In the natural sciences and engineering, legislation creates patents and registered industrial designs. In the arts, social sciences and humanities, legislation creates copyright and trade marks.

Quaternary goods and services are both inputs to primary, secondary and tertiary sector producers, as well as final goods to consumers. In external trade the importance of quaternary goods and services is measured by what are known as "invisible exports". The importance of invisible exports can be illustrated, in the case of the United States, in comparison to the impact of the second oil crisis of 1979 on the American balance of payments.

These "invisible exports", preponderately the yield from human capacity, particularly organizational and managerial capabilities, nearly offset the increased expenditure for petroleum imports that put the foreign-exchange account \$7 billion in the red (Ginsberg, Vojta, 1981).

In the case of Canada, the situation is dramatically different and can be illustrated by comparison with dividend and interest payments to foreigners.

The trade imbalance in "other services", which measures the purchase of managerial and other professional inputs to Canadian governments, and corporations, is, in relative terms, as important a long-term characteristic of Canada's negative invisibles balance, as are interest and dividend payments (Britton, Gilmour, 1978, 30).

Unfortunately, there are no statistics available concerning the contribution of copyright royalty payments to the negative invisibles balance. However, it is possible to estimate the magnitude of industrial activity supported by copyright and the Canadian cultural balance of payments deficit. Specifically, the arts industry, which includes advertising, broadcasting, motion pictures, the performing and visual arts, publishing, and sound and video recording depends upon copyright legislation (Hillman-Chartrand, 1984).

A comparison of the 20 largest Canadian manufacturing industries and the arts industry in 1981 reveals that the arts industry is the largest with employment of 234,280; the 6th largest with salaries and wages of \$2.5 billion; and the 11th largest with revenue of \$7.7 billion (Research & Evaluation, September 1984). Arts industry revenues amounted to 2.4% of the Gross National Product.

Using the Gross National Expenditure Multiplier of 2.1, the income multiplier effect of the Canadian arts industry was at least \$16.3 billion in 1981, or approximately 5% of Gross National Expenditure (GNE).

With respect to the Canadian cultural balance of payments, the Canadian arts industry

imports almost seven times as many books as it exports, four times as many TV programs and four times as many periodicals and newspapers. This trade deficit has been deteriorating over the last decade and is primarily incurred with the United States. We are a country which has been, and remains, awash in American cultural products (Fox, 1983, 14).

If the emerging post-modern economy is increasingly characterized by production of quaternary goods and services, then Canadian copyright and other intellectual property right reform could play a critical role in correcting Canada's traditional balance of payments deficit in invisible exports and imports.

The Dual Nature of Copyright

If copyright reform is to be successful, then it is critical that its nature and historical development be clearly understood. Copyright legislation has, in fact, a long, complex history which colours and clouds current understanding.

Today, copyright is generally understood as a right, granted by the State, as an incentive and reward for creativity. This concept has evolved from an Anglo-French tradition of moral rights of the creator that dates back to the Statute of Queen Anne in 1710 (McDonald, 1971, 17). In this tradition, intellectual property legislation is justified as a protection of and incentive to human creativity. In return for this protection, the State expects creators will make their work available to society as a whole, and that a market will be created in which such work can be bought and sold. But while the State wishes to encourage creativity, it does not want to foster harmful market power. Accordingly, the State builds in limitations to the rights granted to the creator. Such limitations embrace both time and space. Rights are granted for a fixed period of time, and protect only the fixation of human creativity in material form.

The vocabulary of the current copyright debate is thus dominated by two questions: How to encourage creativity without creating harmful market power, and whether or not fixation through electronic means constitutes fixation in material form. With respect to the first question, and in the absence of any statistical evidence to the contrary, it is fair to say that copyright has not, on average, provided significant financial incentives or rewards for individual creators, nor has it created harmful market power in the hands of the individual creator. With respect to the second question, it appears as if the law has not caught up with physics in accepting the electron as part of the material universe.

However, moral rights of the creator are not the actual historical root of copyright in the English-speaking world. Rather, in the 15th century the Tudor monarchs began to grant, only to approved printers, the right to copy only approved works, i.e., copyright. Thus the roots of English-language copyright is censorship and feudal grants of commercial privilege, originally to guilds, and now to corporations (MacDonald, 1971, 14 -16).

These residuals from feudal and crown law did not, as commonly supposed, vanish with the advent of democracy. On the contrary, they survived, in attenuated form to be sure, to plague modern democratic law and government. Though obsolete in practice they still influence "the spirit of the law" (Gray, 1981, 108).

In fact, copyright today still serves primarily as the legal foundation for industrial organization of the arts industry. An extreme example, more common in the United States than in Canada, illustrates the role of copyright in industrial organization. Consider a literary work (publishing) which becomes a play (performing arts) through the exercise, licence or sale of copyright. In turn, the play becomes a film (motion pictures) which, in turn, is spun-off into posters (visual arts), toys (crafts) and a sound track (recordings). Both the film and sound track are broadcast on radio and television (broadcasting). Eventually a book (publishing) is made concerning the making of the movie (motion pictures) and a sequel of the movie is then produced. Even museums and archives have a relationship to copyright in that most artifacts and documents, contained therein, are within the public domain, i.e., copyright has lapsed through time.

It is the ability to exploit and exhaust all revenue streams, implicit and explicit in copyright, which has led to the emergence of major multinational

communications conglomerates such as CBS, Warner Communications, RCA, Time-Life, etc. Against the power of these industrial giants, the individual creator is, on average, powerless. Harmful market power does not in fact result from the grant of copyright to the individual creator, but rather from its use and abuse by corporate copyright holders. The on-going anti-trust case against major English language publishers in the United States, Great Britain and Australia illustrates the monopoly power that corporations can exercise through copyright.

Furthermore, copyright is subject to limitations imposed by international conventions (the Berne Convention and the Universal Copyright Convention). In effect, international conventions require "national treatment" of foreign copyright holders, i.e., treat foreign copyright holders like domestic copyright holders. International conventions severely limit the ability of Canada or any other country from using its Copyright Act to favour and encourage domestic creators.

Dual Tracking Copyright Reform

Copyright reform must account for the dual nature of copyright, i.e., as the legal foundation for the arts industry, and as an incentive to creativity. Failure to account for this duality may partially explain on-going difficulties associated with copyright reform, not only in Canada but also in foreign jurisdictions. Furthermore, if copyright reform is to enhance incentives for creativity and serve as the legal foundation of the arts industry, then it is appropriate to develop a dual track to achieve what are, in fact, contradictory policy objectives.

The first objective is to establish the legal foundation of the arts industry within the context of international conventions and responsibilities. The appropriate policy instrument is the Copyright Act. Given national treatment provisions of international conventions, monopoly power of communications conglomerates and the Canadian cultural balance of payments deficit, it is proposed that copyright reform should result in a "minimalist" Copyright Act. Such an Act would restrict rights and privileges to those required by international convention. No new rights or privileges would be created because they would apply equally to foreign copyright holders, resulting in an increase in the Canadian cultural balance of payments deficit, and an increase in the market power of communications conglomerates.

In order to enhance incentives for creativity, it is suggested that a new order of pecuniary intellectual property rights are required to reward the creative effort of the individual Canadian scientist, inventor and artist. Such rights would not be available to corporate copyright holders. Furthermore, they would be established in legislative instruments separate and distinct from the existing Copyright Act and its collateral system of international conventions in order to provide differential incentives to Canadian creators.

Other jurisdictions are beginning to follow such an approach. Recent passage of the Semiconductor Chip Protection Act by the United States Congress is an example of rights, similar to copyright, but created outside the Copyright Act and international conventions (High Technology, 1984, 74-75). In the arts, examples of new rights include Public Lending Rights for authors whose works are borrowed from libraries; Exhibition Rights for artists whose works are publicly exhibited; Rights of Following Sales for visual artists to earn some return on the increased value of their works; Celebrity Rights; and Performance Rights for actors, singers and dancers. Many of these rights have been established in California and have been declared constitutional, even though they apply only to Californian artists (Kibbe, 1980).

In addition tax exemption, or similar special treatment of income earned by individuals from all intellectual property rights could be initiated in Canada. In Ireland, for example, all copyright income earned by individuals is exempt from tax. The effect is to create a tax haven for creative individuals. The same principle could be extended to income from patents and other intellectual properties earned by an individual.

Such a new regime of intellectual property rights would have significant implications for many individuals and institutions which currently avoid royalty payments, e.g., libraries, arts galleries, and museums. However, significant incentives would be created for individual creators. Some increase in financial rewards would also be forthcoming to artists, who are second only to pensioners as the lowest paid occupation recognized by Revenue Canada (Hillman-Chartrand, 1984). Furthermore, tax expenditure costs to government would be minimal if restricted to individual tax payers.

Conclusions

The emerging post-modern economy is increasingly characterized by production of abstract or quaternary goods and services which include scientific and technical inventiveness, excellence in the arts, quality of life, community development, national unity, natural rights of the environment and other abstract, but highly valued, aspects of contemporary life. While quaternary commodities are highly valued by society they cannot be marketed in the conventional way. Rather, they must be transformed through law before "value-in-exchange" can be created, and "free-riders" excluded. In modern society, creative effort is transformed, and to a greater or lesser degree, protected from piracy through intellectual property legislation. In the natural sciences and engineering, legislation creates patents and registered industrial designs. In the arts, social sciences and humanities, legislation creates copyright and trade marks.

Canada suffers from an acute balance of payments deficit with respect to invisible exports and imports including payments for managerial services, tourism and intellectual properties royalties. Canadian copyright reform could play a significant role in correcting Canada's traditional balance of payments deficit in such invisible exports and imports. However, if copyright reform is to be successful, then it is critical that its nature and historical development be clearly understood. Copyright reform must account for the dual historical nature of copyright, i.e., as the legal foundation for the arts industry in the context of international convention, and as an incentive to creativity.

In order to establish the legal foundation of the arts industry within the context of international conventions and responsibilities, the appropriate policy instrument is the Copyright Act. Given national treatment provisions of international conventions, monopoly power of communications conglomerates and the Canadian cultural balance of payments deficit, however, it is proposed that copyright reform should result in a "minimalist" Copyright Act. Such an Act would restrict rights and privileges to those required by international convention. No new rights or privileges would be created because they would apply equally to foreign copyright holders resulting in an increase in the Canadian cultural balance of payments deficit, and in an increase in the market power of communications conglomerates.

In order to enhance incentives for creativity, it is suggested that a new order of pecuniary intellectual property rights are required to reward the creative effort of the individual Canadian scientist, inventor and artist. Such rights would not be available to corporate copyright holders. Furthermore, they would be established in legislative instruments separate and distinct from the existing Copyright Act and its collateral system of international conventions in order to provide differential incentives to Canadian creators. Other jurisdictions are beginning to follow such an approach.

In the arts, examples of new rights include Public Lending Rights for authors whose works are borrowed from libraries; Exhibition Rights for artists whose works are publicly exhibited; Rights of Following Sales for visual artists to earn some return on the increased value of their works; Celebrity Rights; and Performance Rights for actors, singers and dancers. In addition tax exemption, or similar special treatment of income earned by individuals from all intellectual property rights could be initiated in Canada.

Such a new regime of intellectual property rights would have significant implications for many individuals and institutions which currently avoid royalty payments, e.g., libraries, arts galleries, and museums. However, significant incentives would be created for individual creators. Some increase in financial rewards would also be forthcoming to artists, who are second only to pensioners as the lowest paid occupation recognized by Revenue Canada (Hillman-Chartrand, 1984). Furthermore, tax expenditure costs to government would be minimal if restricted to individual tax payers.

It is suggested that a dual track approach could achieve both contradictory objectives of copyright reform, i.e., to create an effective legal foundation for the arts industry in the context of international convention, and to create meaningful incentives for Canadian creators. If the ultimate economic resource is human creativity then through introduction of an integrated regime of new intellectual property rights, and the exemption of copyright income earned by individuals, Canada could develop the first truly post-modern economy, an economy of the imagination.

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